

b) SWBT's Performance Is Poor Even Using Its Inadequate Data.

Moreover, SWBT's data in fact reveals poor performance. SWBT has consistently missed a high percentage of the performance measures implemented by the Texas PUC. It missed 16% of the measures in October and the same in November. McMillon & Sivori Decl. ¶ 234, att. 28.^{17/} At current low volumes of orders, SWBT should be meeting every measure. Even if it could be argued that particular misses were not in and of themselves significant impediments to competition, the aggregate number of misses is a significant impediment.

In addition, many of the measures SWBT has missed are key measures for CLECs. As explained above, SWBT is consistently missing the measure for timely return of manually processed rejects. It is also failing to return FOCs in a timely manner. The performance metrics require SWBT to provide 95 percent of FOCs for loop orders received via EDI within 5 hours and 95 percent of FOCs for loop orders received manually within 24 hours. See SWBT Performance Measure 5, Percent Firm Order Confirmations Returned, Benchmark (McMillon & Sivori Decl., att. 19). SWBT has failed both of these measures for the past three months. For EDI loop orders, SWBT has managed to return only 88.1, 92.7, and 85.8 percent on time in October, November, and December respectively. Performance Measure 5, Percent FOCs

^{17/} This includes parity measures in which the z score was 1.645 or greater; measures in which SWBT missed a benchmark; and parity measures that had a marginal score of 0.8225 to 1.645 combined with a score of at least 0.8225 for one of the prior two months. This is the method used in New York. Even under the defective Texas scheme with inappropriate leniency, however, see Part II.B.1 below, SWBT missed 12% of the measures in October and 14% in November. McMillon & Sivori Decl. ¶ 234, att. 28.

received within 5 hours - Mechanized - EDI - UNE Loops 1-50. McMillon & Sivori Decl., att.

19.

SWBT has also failed to provide timely FOCs for manual loop orders, and the problem is getting worse. SWBT reports providing only 88.7 percent and 80.7 percent of FOCs for manual loop orders on time in October and November respectively.^{18/} Performance Measure 5, Percent FOCs received within 24 hours - Manual - UNE Loops 1-50 (McMillon & Sivori Decl., att.

19).^{19/} These numbers are actually far worse than they appear. In calculating return time, SWBT excludes hours between 5:00 p.m. and 8:00 a.m. on weekdays and excludes weekends and holidays altogether. SWBT Performance Measures and Business Rules, Version 1.6,

Performance Measure 5, Business Rules (McMillon & Sivori Decl., att. 19). Thus, if a CLEC places an order at 5:30 p.m. on Monday night and receives a FOC at 9:00 a.m. on Tuesday,

^{18/} SWBT claims that it returned some 94.9 percent of FOCs for manual loop orders on time in December, but this figure is highly suspect in light of the fact that SWBT's average FOC return time in December was almost 43 hours per FOC. Performance Measure 6, Average Time to Return FOC - Manual - UNE Loop (1-50) (McMillon & Sivori Decl., att. 19).

^{19/} SWBT has struggled to return FOCs for other manual orders as well. While SWBT claims to be returning timely FOCs on manually processed orders, see SWBT Br. at 88 n.48; Dysart Aff. ¶ 133, it has failed three of the seven measures for manual FOCs. In addition to failing to provide timely FOCs for manual UNE-loop orders (1-50 lines), SWBT has not provided FOCs on time for either manual complex business orders or manual switch port orders. SWBT is supposed to provide timely FOCs for complex business orders 94 percent of the time. However, SWBT has failed to meet this standard for two of the past three months, recording return rates of only 83.9 and 87.9 percent in October and November. Performance Measure 5, Percent FOCs received within 24 hours - Manual - Complex Business (1-200 lines) (McMillon & Sivori Decl., att. 19). Similarly, SWBT has consistently missed the mark for switch port orders, which require a 95 percent on-time return rate for FOCs, and its performance continues to deteriorate. In October, SWBT returned 87 percent of FOCs on time. In November, that figure dropped to 74.2. And in December, even with ordering volumes down significantly, SWBT reports a dismal 36.4 percent on-time rate. Id., Switch Ports (McMillon & Sivori Decl., att. 19).

SWBT considers the FOC to have been returned in one hour.^{20/} McMillon & Sivori Decl. ¶ 151. CLECs such as MCI WorldCom that primarily market their service between 6:00 p.m. and 9:00 p.m. therefore receive FOCs that are far more dilatory than is apparent from SWBT's data. SWBT also considers a FOC to be returned even before it has been transmitted to CLECs. Id. ¶ 152.

SWBT also has consistently provided repair and maintenance service of higher quality and in a more timely manner for its retail customers than it has for CLEC customers. The percentage of repeat reports of trouble on customers' lines is consistently lower for SWBT retail customers than for CLECs. Performance Measure 41, Percent Repeat Reports. In South Texas, for instance, the percentage of repeat trouble reports for CLEC UNE-Platform customers was 15.7, 11.5, and 11.73 percent for September, October, and November as compared with 8.52, 8.12, and 7.61 percent for SWBT's customers. Performance Measure 41, South Texas, Percent Repeat Reports - UNE Loop & Port Combos (McMillon & Sivori Decl. ¶ 203, att. 19). In December, SWBT improved somewhat but still provided only marginally passable service with 9.94 percent repeat troubles for CLEC customers and 7.73 percent for its own. Id. The disparity

^{20/} In contrast, Bell Atlantic counts peak CLEC ordering hours in its measurement of FOC return time. See BA-NY Performance Measure OR-1 Order Confirmation Timeliness Exclusions (excluding only weekend hours from 5:00 p.m. Friday to 8:00 a.m. Monday). As a result, SWBT's comparison of the time it takes to return FOCs with the time it takes Bell Atlantic to return FOCs, Ham Aff. ¶ 156, is totally inapposite.

in other regions is similar. Id. ¶¶ 204-05.^{21/} CLEC customers who experience repeat troubles are obviously likely to return to SWBT to obtain service. McMillon & Sivori Decl. ¶ 202.

In addition, when SWBT makes a commitment to resolve a customer's troubles, it is far more likely to meet that commitment for its retail customers than for CLECs' customers (both for repairs that require dispatch of a technician to the customer premises and for repairs that do not). Performance Measure 38, Percent Missed Repair Commitments (McMillon & Sivori Decl. ¶ 206, att. 19). In Central West Texas, for example, SWBT has missed between two to five times the percentage of scheduled repair dates for CLEC UNE-P customers than it has for its own customers over the past several months. SWBT's performance in November is representative. SWBT missed fully 11.16 percent of repair times with dispatch and 5.0 percent without dispatch for CLEC customers, while missing only 6.88 percent with dispatch and 1.29 percent without dispatch at retail. Performance Measure 38, Central West Texas, Percent Missed Repair Commitments - Dispatch - UNE Loop & Port Combos (McMillon & Sivori Decl. ¶ 206). The situation was the same in South Texas, where SWBT missed 21.10 percent of CLEC customer repair dates with dispatch and 6.06 percent without dispatch, but only missed 8.77 percent with

^{21/} In Houston, the CLEC percentages of repeat problems were consistently poor from September through December. There were 15.33, 8.26, 10.86, and 10.08 percent repeat troubles for CLECs as compared with 8.39, 8.77, 8.44, and 9.10 percent for SWBT. Measure 41, Houston, Percent Repeat Reports - UNE Loop & Port Combos (McMillon & Sivori Decl., att. 19). Finally, in Dallas/Fort Worth, SWBT's repair and maintenance service has gone from bad to worse. From September through October, SWBT reported 10.66, 10.74, and 8.74 percent repeat troubles for CLEC customers and 8.13, 7.83, and 8.16 percent on SWBT lines. Id., Dallas/Fort Worth, Percent Repeat Reports - UNE Loop & Port Combos (McMillon & Sivori Decl., att. 19). In December, the percentage of repeat troubles for CLECs actually rose to 10.24 percent, as compared with only 8.56 percent for SWBT. Id.

dispatch and 1.4 percent without dispatch for itself. Performance Measure 38, South Texas, Percent Missed Repair Commitments - No Dispatch - UNE Loop & Port Combos (McMillon & Sivori Decl. ¶ 207, att. 19). Failure to meet commitments to resolve troubles will anger customers – especially when those customers have stayed home to meet a technician. McMillon & Sivori Decl. ¶ 207.

SWBT has also failed to show that it can consistently provide timely wholesale bills electronically. Under its performance measures, SWBT is supposed to provide 95 percent of wholesale bills within six business days from the billing date. Performance Measure 18, Billing Timeliness. SWBT has failed this measure by significant amounts in recent months. In November and December, SWBT provided timely wholesale bills to CLECs only 76.4 percent and 76.3 percent of the time, respectively. Performance Measure 18, Billing Timeliness (Wholesale Mechanized Bill) (McMillon & Sivori Decl. ¶ 215, att. 19). It is difficult for a CLEC to operate efficiently if it does not know when it will receive its bills.

c) The Telcordia Test Also Demonstrates SWBT's Poor Performance and Certainly Does Not Prove SWBT's Performance Is Acceptable.

Given the absence of adequate performance data to demonstrate the readiness of SWBT's systems, SWBT must rely heavily on the Telcordia test to show its readiness. But that reliance is misplaced. The Telcordia test was not conducted by a neutral party, used an inadequate methodology, failed to accurately assess the import of deficiencies it did find, failed to demand full (or in some cases any) corrections of those deficiencies, and was incomplete in scope.

Nonetheless, the first thing to note about the Telcordia test is that even this inadequate test revealed significant deficiencies in SWBT's OSS. A careful review of Telcordia's specific findings undermines its results-oriented conclusion that SWBT's OSS is operationally ready. As explained above, Telcordia described numerous errors caused by manual processes employed by SWBT. It described severe, customer-affecting problems during coordinated cutovers (including lost dial tone by several customers), and it discussed the problem with SWBT's inability to receive electronically submitted trouble tickets until orders had posted to billing. The Telcordia test therefore shows that SWBT's OSS is not operationally ready.

Equally important, no conclusion can be drawn concerning aspects of SWBT's OSS Telcordia did not criticize, because the "test" was so clearly stacked in favor of SWBT. First, Telcordia (formerly Bellcore) was not a neutral third party. Telcordia oversaw the testing of various SWBT systems that Telcordia itself had developed, presenting an obvious conflict of interest. In addition, SWBT remains a major Telcordia customer that Telcordia would not want to alienate. A large percentage of Telcordia's revenues comes from BOCs (who are all in the process of applying for section 271 approval), a fact Telcordia has never rebutted.

Second, Telcordia did not build the interfaces it used but instead relied on AT&T's UNE-P interface and MCI WorldCom's UNE-L interface. Compare McMillon & Sivori Decl. ¶ 243 with NY Order ¶ 96 (KPMG built the interfaces and acted as a pseudo-CLEC). This hindered Telcordia's ability to assess whether SWBT was to blame for various problems encountered during the test because, rather than having first-hand knowledge of whether a problem was SWBT's fault, Telcordia had to judge between competing accounts. McMillon &

Sivori Decl. ¶ 243. It also left CLECs other than those whose interface was being used relatively blind to problems encountered during the test and to any fixes implemented, and it precluded Telcordia from accurately evaluating the comprehensiveness of SWBT's documentation. Id. As the UNE-P test was proceeding, for example, MCI WorldCom was largely unaware of the problems encountered by AT&T and thus unable to make informed suggestions with respect to possible solutions or new testing. When the test was over, it was not in AT&T's interest to share with its competitors the details of any solutions that had been implemented. In New York, in contrast, MCI WorldCom's development was expedited by its ability to track problems and have Bell Atlantic correct them, based on the open test in which KPMG built to Bell Atlantic's documentation. Id.

Third, Telcordia did not clearly define the test plan or obtain significant CLEC participation in designing that plan. Telcordia did not provide the master test plan to interested parties until three weeks after UNE-L testing began and the plan continued to be revised thereafter. Id. ¶ 242. CLECs were excluded from some parts of the process and allowed to bring only two or three representatives to key technical meetings, preventing them from bringing subject matter experts when multiple subjects were discussed. SWBT, by contrast, was permitted to bring many representatives to each meeting. Id. After the conclusion of the interim test, Telcordia produced the retest plan late with almost no time left for CLEC comment prior to the beginning of the retest so that it was not possible for CLECs to alter any significant aspect of the test design. Id. Then, at the conclusion of the test, CLECs were denied in their request for an

open meeting at which they could discuss test conclusions with Telcordia and raise questions about Telcordia's research in an effort to arrive at a more accurate report. Id.

Fourth, despite SWBT's claims to the contrary (Br. at 30), Telcordia did not conduct a military-style test. Unlike KPMG in New York, see NY Order ¶ 98, Telcordia did not identify problems as it went along and demand that SWBT implement a fix for those problems and then conduct a retest. Instead, after identifying problems during the first phase of the test, Telcordia simply conducted a retest and, if the problems did not reappear, assumed that the problems had been corrected even if SWBT had not implemented any changes in the interim. McMillon & Sivori Decl. ¶¶ 184-88, 244-46. Telcordia made little effort to assess the root cause of the original problems. But there is no reason to presume that a problem that does not reappear on a small volume of orders during a retest has been corrected. Id. ¶ 244. This is especially so given that SWBT knew what would be retested and was also able to ascertain when the test orders were being transmitted. Id.

In addition, with respect to problems identified during the retest, SWBT again conducted little in the way of a root cause analysis, and, when SWBT claimed to have implemented a fix, Telcordia assumed that the fix would work without conducting any further testing. Id. ¶ 245. For example, during the retest, Telcordia failed to return correct information on FOCs on almost 43% of MCI WorldCom's orders. Id. ¶ 185. SWBT claimed to have implemented a fix for this problem but only one part of the fix was tested. Readiness Report at 53. To this day, MCI WorldCom is unsure as to whether the problem has been eliminated. McMillon & Sivori Decl. ¶ 185. Similarly, Telcordia noted a problem with SWBT's processing of related orders but

asserted the problem had been fixed by a change in documentation. Ham Aff. att. A at A 49-50. Telcordia did not address the question as to whether, after the documentation change, SWBT would correctly process such orders. McMillon & Sivori Decl. ¶ 143.

Telcordia's failure to require fixes and then to test those fixes is particularly apparent in the case of problems caused by manual processing. Again and again, Telcordia identified mistakes made in manual processing of the orders and then closed out the issue without any change by SWBT, or at most, with the retraining of the individual representative who made the error. Thus, in response to a problem with late provisioning, Telcordia explained that "[t]here are a myriad of reasons why circuits are provisioned late or incorrectly ranging from inexperienced staff to heavy work volumes in the Central Office. Telcordia has verified all of these orders, which have been provisioned late or incorrectly during the Retest Phase."

Readiness Report at A 59-60. Similar examples abound in which Telcordia closed out issues raised by manual errors without implementation of any systemic fix. See, e.g., id. at A 51-52, A 55, A57-59.

Finally, the scope of the Telcordia test was too narrow. Telcordia did not conduct analysis of the retail side of SWBT's processes, simply accepting SWBT's word as to how those processes worked. McMillon & Sivori Decl. ¶ 249. Telcordia did not provide any detailed analysis of any of the functional deficiencies discussed above. It did no testing of SWBT's EDI or CORBA pre-ordering interfaces and did not test the ability of a CLEC to construct an integrated pre-order and order interface using SWBT's other application-to-application pre-ordering interface, Datagate. Id. Telcordia's evaluation lacked any detailed evaluation of the

folders process or of SWBT's procedure of splitting LSR into three service orders, or of mismatches in SWBT's address databases. Id.

Telcordia's scope was too narrow in other ways as well. Telcordia failed to conduct an end-to-end evaluation of the ordering and provisioning process, generally excluding any evaluation of SWBT processes beyond its SORD system. Id. Telcordia did not stress test SWBT's manual processes, evaluated very few DSL orders, and failed to audit SWBT's collection of raw data with respect to most performance measures. Id. ¶¶ 249, 252. Telcordia's review of maintenance and repair functionality was limited to a small number of trouble tickets almost all of which involved the same problem (a pulled coil). Id. ¶¶ 210-13. Telcordia's review of performance of the LOC and LSC was limited and, although Telcordia observed significant difficulties that MCI WorldCom experienced in contacting the LOC, Telcordia buried the issue in an appendix noting that "[i]n several instances the SWBT Rep did not respond in the time frame they had specified and the CLEC then initiated another call to SWBT to find out the status of the request." Readiness Report at 55. Telcordia lists the action taken as follows: "[T]his is a closed issue, it does not impede the functionality of the orders, but it can impact the timeliness of how orders are processed and provisioned." Id.

Telcordia's review of change management, the importance of which this Commission has emphasized, NY Order ¶¶ 102-03, was also insufficient to conclude SWBT is operationally ready. Telcordia reviewed SWBT's implementation of two minor EDI releases. During the first release, conducted in August prior to SWBT's implementation of new change management procedures, Telcordia found that SWBT frequently deviated from documented procedures

(although Telcordia whitewashed this finding by concluding that SWBT's overall conduct was acceptable). During the second release in October, conducted only partially under the improved change management rules, Telcordia found that SWBT did follow its documented procedures. However, the fact that SWBT followed change management procedures for one minor release, while under the microscope, after repeated deviations from written procedures prior to that release, hardly shows that SWBT will follow such procedures during a major release when observing the procedures is much more difficult. Id. ¶¶ 217-24. This is especially so given that even in October, SWBT again and again invoked the exceptions process in the change management rules to make changes to documentation that was ostensibly final. Id. ¶ 221. Although exceptions are sometimes necessary, they should not become the rule. Id. SWBT should therefore be required to prove its compliance with change management procedures in a major release observed by a neutral third party. Moreover, it is only with the July release that SWBT will first implement versioning, an essential component of a successful change management program. Id. ¶ 224.

The deficiencies in the Telcordia test and MCI WorldCom's own negative experience during that test are yet another factor against entering the residential market at this time. When combined with SWBT's inadequate – and relatively poor – performance data and with the vital functional deficiencies in SWBT's systems, the Commission cannot properly conclude that SWBT's OSS satisfies the standards set forth in the Commission's prior orders.

C. SWBT Imposes Glue Charges and Lost Profits Charges That Are Not Cost-based and Seriously Impede Residential and Small Business Services Competition

The ability of MCI WorldCom and other CLECs to compete for local customers on a level playing field is, of course, critically dependent on the prices SWBT charges for unbundled elements. In a few areas, SWBT's prices are grossly excessive and unlawful.

1. The Non-Recurring Rates SWBT Charges for Existing UNE Combinations Violate FCC Rule 315(b) and the Supreme Court's Decision Upholding The Rule Against SWBT's Challenge in Iowa Utilities Board

It is now firmly established that SWBT cannot impose charges for separating existing combinations of network elements and recombining them. See FCC Rule 315(b), 47 C.F.R. § 51.315(b).^{22/} Nonetheless, SWBT insists on charging new entrants non-recurring rates established prior to the Supreme Court decision in Iowa Utilities Board – rates that were intended to compensate SWBT for separating and recombining network elements that were combined in its network, even though SWBT admits it never actually does so.^{23/} See Declaration of Donald G. Price ¶¶ 7, 8 (Tab C hereto). As a result, when an existing SWBT customer migrates to MCI WorldCom and MCI WorldCom leases an existing loop-port combination to serve the customer, SWBT charges a non-recurring rate in excess of \$20, devised to cover the costs of separating and

^{22/} Rule 315(b) was affirmed by the Supreme Court in AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 737-38 (1999).

^{23/} SWBT witness Michael C. Auinbauh admits in his affidavit that "SWBT does not separate the specific unbundled network elements requested that SWBT has currently combined in its network unless requested to do so by the CLEC." Auinbauh Aff. ¶ 87.

recombining the loop and port UNEs that are already connected in SWBT's network and are fully functional. See Price Decl. ¶¶ 9, 10.

These charges violate the Act and the FCC's Rule 315(b), and impose a serious obstacle to competitive entry for MCI WorldCom and other CLECs who wish to serve residential consumers and small businesses. See McMurtrie, Macko and Lichtenberg Decl. ¶ 36.^{24/} The only non-recurring cost caused by the migration is the cost of updating the switch translation. Another state commission found that the costs caused by an existing ILEC customer migrating to a CLEC justified a total non-recurring charge for a loop-port combination of only \$1.46. See Final Order Resolving Interconnection Agreement Disputes, Addressing Retail Service Composition, and Setting Non-Recurring Charges, Florida PSC, Docket No. 971140-TP (June 16, 1998), at 68 (attached to Price Decl. as Exh. 1); Price Decl. ¶ 12. SWBT provides no basis for charging over 14 times more in Texas for the same minor task. Moreover, SWBT's insistence on continuing to impose charges for separating and recombining pre-existing combinations of elements is inconsistent with the Act and with the FCC's regulations. Almost all of the more than \$20 charge constitutes an improper glue charge.

2. SWBT Charges Competitors An Additional Glue Charge For New Combinations That Provides SWBT With A Double Recovery.

SWBT levies yet an additional charge on CLECs who lease "new" combinations of UNEs – combinations that do not already exist in SWBT's network and require some amount of work

^{24/} SWBT's contention that its non-recurring rates for pre-existing combinations are "cost-based," see SWBT Br. at 38 n.15, is refuted by the Texas PUC's arbitration award and, moreover, by its own cost studies. See Price Decl. ¶ 11.

to assemble. (“New” combinations include both typical combinations for new customers as well as new types of combinations.) In addition to the UNE non-recurring rates discussed above, which supposedly cover the costs of combining the network elements, for new combinations SWBT imposes an additional glue charge of \$16.35, which it calls a Central Office Access Charge (“COAC”). The COAC supposedly covers the costs of combining the elements, see SWBT Br. at 37-38; Price Decl. ¶¶ 13, 14, and thus is wholly duplicative. The same activities are paid for through both the individual UNE non-recurring charges and the COAC charge. See Price Decl. ¶¶ 16-17. MCI WorldCom is prepared to pay for necessary work that is actually performed, at cost-based rates, but as the Commission has long recognized, such a double recovery is certainly not cost-based pricing and violates section 252(d)(1) of the Act. See First Report and Order ¶ 698 (stating that “[a]ny multiple recovery would be unreasonable and thus in violation of the statutory standard.”).

In addition, the \$16.35 COAC is not cost-based because it was not based on specific, relevant costs. Instead, it is a retail rate, established in a rate-of-return proceeding, and includes SWBT’s embedded and historical costs. See Price Decl. ¶¶ 15, 18. This is expressly prohibited by section 252(d)(1) of the Act and this Commission’s orders. See First Report and Order ¶¶ 704-07.

3. SWBT Imposes A Special Charge On Extended Area Calls, Not Based On Any Costs Incurred By SWBT, But To Recover Revenues Lost To CLECs.

SWBT imposes an Extended Area Service (“EAS”) additive charge that it admits is intended to compensate SWBT for lost revenues. See Price Decl. ¶ 19. EAS is a popular optional retail service that enables residential and business customers to extend the coverage of their flat-rate local calling area for a set monthly fee. Thus, calls that otherwise would be “non-local” and involve the caller paying usage-sensitive rates (i.e., per minute of use charges) are made toll free. See id. ¶ 20.

If a customer subscribes to EAS, any call from the subscriber to a person or business located in its “extended” calling area is toll free. Moreover, any incoming call to the EAS subscriber that originates in its “extended” calling area is toll free and the person or business making the call is not subject to any per minute of use charges. See id. ¶ 21.

Whenever a SWBT customer from an extended area calls a CLEC EAS subscriber, however, SWBT charges the CLEC an “additive” charge of 2.4 cents per minute if the call is between contiguous exchanges in a metropolitan areas and 3.55 cents per minute if the call is between non-contiguous exchanges in a metropolitan area. See id. ¶¶ 22-23. The Texas PUC has acknowledged that this additive charge is solely intended to compensate SWBT “for artificial losses for EAS revenues it once received from customers that have moved to a new entrant.” See 12/19/97 Arbitration Award, Appendix A, Issue 1180, at 11 (SWBT App. F, Tab 17); Price Decl. ¶ 24.

As this Commission has expressly found, rates designed to recover lost revenues are inconsistent with a cost-based pricing methodology and, therefore, violate section 252(d)(1) of the Act. See First Report and Order, ¶¶ 708-711 (rejecting application of the doctrine of efficient component pricing, which is designed to compensate for lost revenues); id. ¶¶ 704-07 (recovery of historical or embedded costs are inconsistent with the pro-competitive goals of the Act). Rates designed to recover historical and/or stranded costs are routinely rejected. See, e.g., Order Establishing Cost-Based Rates, In re Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services, Georgia Public Service Commission Docket No. 7061-U (Oct. 21, 1997) at 20-21 (attached to Price Decl. as Exh. 3) (“allowing BellSouth’s proposed Residual Recovery Requirement would run counter to the goal of moving Georgia’s telecommunications marketplace toward competition, and would contravene the directive of the 1996 Act at Section 252(d)(1)(A) that UNE prices are to be based on the cost ‘determined without reference to a rate-of-return or other rate-based proceeding.’”). SWBT’s EAS additive charge flatly defies the Act and the FCC’s Order, and places CLECs at a competitive disadvantage with respect to a highly popular service, raising an obstacle to competition for residential and small business customers.

D. SWBT Has Not Satisfied Its Statutory Obligations with Respect to Provisioning DSL-Capable Loops.

SWBT has not yet met the requirements of the Act with respect to the provisioning of DSL-capable loops. While the DSL Arbitration Award recently approved by the Texas PUC^{25/}

^{25/} Petition of Rhythms Links, Inc. For Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company; Petition of Dieca Communications,

represents a major step toward leveling the playing field in this competitively significant area of DSL-based services, there are a few problems that remain. Because these problems currently have the most direct and immediate impact on data CLECs, MCI WorldCom defers to their Comments concerning DSL-based services, and simply notes some of the more serious problems below.

SWBT's Performance in Provisioning DSL-Capable Loops. In the NY Order, the Commission established the requirements for nondiscriminatory provisioning of DSL-qualified loops to which subsequent section 271 applications would be held.^{26/} The Commission permits BOCs to demonstrate adequate DSL provisioning either through validated performance reporting or by the establishment of a separate, advanced services affiliate. See NY Order ¶¶ 330-36. SWBT has satisfied neither of these requirements. According to its own performance reports, SWBT is not consistently providing nondiscriminatory service to its competitors for DSL-capable loops.^{27/} Nor is SWBT's advanced services affiliate sufficient to provide assurance of

Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Southwestern Bell Telephone Company, Arbitration Award, Public Utility Commission of Texas, Docket Nos. 20226 and 20272 (Nov. 30, 1999) ("DSL Arbitration Award").

^{26/} In determining that Bell Atlantic provisioned DSL-capable loops in accordance with the Act, the Commission overlooked Bell Atlantic's DSL performance deficiencies and relied instead on Bell Atlantic's overall loop performance. The Commission stated, however, that "we do not expect to rely solely on a BOC's overall loop performance in reaching a decision on this checklist item in future applications." NY Order ¶ 330 (footnote omitted).

^{27/} See Southwestern Bell Provisioning & Maintenance Report (December 1999) (McMillon & Sivori Decl., att. 19).

nondiscrimination, since SWBT has yet to take many of the steps that would create a firewall between its advanced services business and the rest of its operations.^{28/}

Access to Loop Makeup Information. The Commission determined in the NY Order that BOCs “must provide requesting carriers nondiscriminatory access to the systems and processes for identifying loop characteristics that it provides to its retail representatives.” NY Order ¶ 141. Yet SWBT has made it more difficult for CLECs to gain access to loop makeup information than for its own retail representatives. See DSL Arbitration Award at 61, 70. In addition, the mechanized loop information that SWBT provides is inadequate for CLEC needs. SWBT’s automated “red, yellow, green” system is not useful for CLECs that do not choose to use ADSL to provide service. See Chapman Aff. ¶¶ 7-17.^{29/}

SWBT’s DSL Pricing Is Still Interim and Subject to Appeal. The prices charged by SWBT for DSL-capable loops are only interim, and SWBT has expressly reserved its right to appeal the DSL Arbitration Award. SWBT’s DSL rates are thus even more uncertain than in a situation where interim rates subject to true-up have been established, in that SWBT’s challenge

^{28/} SWBT’s affiliate, SBC Advanced Solutions Inc. (“ASI”), will not begin operations in Texas until February 2, 2000 (see SWBT Br. at 44), and will not even begin converting SWBT advanced services customers (other than ADSL customers) to ASI until February 28, 2000, while SWBT provides no definite date for commencing the conversion of ADSL customers. See Brown Aff. att. A, p. 3; see also Brown Aff. ¶ 22. Significantly, in the NY Order, the Commission noted but did not rely upon Bell Atlantic’s promise to form a separate subsidiary to handle advanced services in determining that Bell Atlantic was in compliance with the Act. See NY Order ¶¶ 327, 331 n.1036.

^{29/} SWBT has stated that it will not provide mechanized access to actual (as opposed to designed or theoretical) loop qualification information until December 2000. See “OSS Plan of Record for Pre-Ordering and Ordering DSL and Other Advanced Services” p. 17 (Chapman Aff. att. E).

to the arbitration award could invalidate even the interim rates set by the award. Thus, SWBT's application does not meet the strict criteria set by the Commission for approval of an application despite interim pricing. See NY Order ¶ 259.

Other DSL Mandates. There are a number of other regulatory requirements pertaining to DSL competition with which SWBT has yet to comply. Although SWBT is not yet required to implement all of these mandates, it is important that SWBT demonstrate its progress toward compliance. The requirements include (1) fully dismantling SWBT's discriminatory practices with respect to spectrum management, (2) implementing the Commission's line sharing requirements, (3) and providing unbundled access to copper subloops pursuant to the DSL Arbitration Award.

E. SWBT's Provision of Unbundled Elements to CLECs Must Include the Same Level of Protection from Third Party Intellectual Property Claims That SWBT Enjoys

SWBT continues to refuse to provide or secure the necessary intellectual property rights for CLECs to use SWBT's network elements. By doing so, SWBT has erected a significant barrier to competition in Texas, as well as violated its duty under checklist item (ii) to provide nondiscriminatory access to network elements. Under the "T2A" (SWBT's generic "Texas 271 Agreement"), CLECs are expressly responsible for obtaining all licenses associated with their use of UNEs, and SWBT makes no warranties concerning CLECs' rights to use UNEs – including CLECs such as MCI WorldCom who intend to lease the "UNE-Platform" from SWBT. See T2A §§ 7.3.2, 7.3.4. Although SWBT's intellectual property agreements with its vendors should provide the needed protection for CLECs who lease UNEs from SWBT, it is difficult for

CLECs to rely exclusively on agreements to which they are not parties. SWBT's interest lies in raising CLECs' costs, and third party vendors' interests are to maximize their own revenues. Thus, the two parties to the contracts governing intellectual property usage have no incentive to interpret the contracts to protect CLECs who lease elements from SWBT.

For similar reasons, CLECs cannot plausibly negotiate licenses independently with SWBT's vendors. When SWBT purchases elements of its network such as switching equipment, it has a choice of vendors and can use its considerable purchasing power to negotiate favorable rates (if any) for intellectual property rights. CLECs who lease UNEs from SWBT, in contrast, have no leverage and are entirely captive. CLECs must use whatever UNEs SWBT already purchased, and cannot shop around for other vendors. Thus, any "negotiation" between a CLEC and a third party vendor would be one-sided: the vendor could name its price to the captive CLEC. Thus, SWBT has it within its power to deal with its equipment suppliers to ensure license and usage rights for CLECs, but CLECs have no leverage in negotiating such licenses and their efforts can be quietly – and undetectably – blocked by SWBT. See AT&T Communications v. Bell Atlantic-Virginia, Inc., 197 F.3d 663, 670-71 (4th Cir. 1999) (ILEC has a duty to negotiate intellectual property rights for CLECs that lease ILEC UNEs). SWBT's refusal to do so is a blatant example of a barrier to entry that facially discriminates against CLECs. See Beard & Mayo Decl. ¶¶ 46-57.

The risk and uncertainty of intellectual property claims – as well as the cost of defending such claims -- is just one more reason why entry in Texas presents an unacceptably high risk. See McMurtrie, Macko and Lichtenberg Decl. ¶ 38. Even when the OSS problems are fixed,

SWBT's prices for unbundled elements (including the glue charges) make residential entry a marginal business proposition. Factoring in the risk of liability for possible intellectual property claims, and the costs of defending such claims, tilts the business case even further against commercial scale entry.^{30/}

The Commission is currently considering a petition for a declaratory ruling on this issue that MCI filed nearly three years ago. See Pleading Cycle Established for Comments on Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Elements, CCBPol 97-4, Public Notice, 12 F.C.C.R. 3223 (1997). SWBT's effort to avoid this issue by merely promising to follow any lawfully imposed regulations flowing from this proceeding, SWBT Br. at 36 n.14; T2A § 7.3.5, should be unavailing. SWBT cannot be considered in present compliance with its checklist obligation to provide nondiscriminatory access to UNEs. See 47 U.S.C. § 271(c)(2)(B)(ii). SWBT can no more hide behind the pendency of the intellectual property complaint proceeding than it could refuse to provide OSS to competitors, yet "agree to be bound by" any final court decision when CLECs pursue enforcement actions. Moreover, SWBT's application cannot be considered consistent with the public interest, as SWBT has known of this barrier for years but has obdurately refused to correct its discriminatory treatment of CLECs.

^{30/} It is no comfort to MCI WorldCom that third party vendors have not yet brought suit; owners of intellectual property rights wait for high revenue streams from alleged use of their intellectual property before they threaten suit. Although MCI WorldCom would have solid legal defenses to any such suit because SWBT's rights should pass through to its customers (CLECs), absent pressure from regulators SWBT has no incentive to interpret its contracts to protect CLECs, and MCI WorldCom would face substantial costs even having to litigate intellectual property disputes with SWBT's multiple vendors.

F. SWBT Discriminates Against CLECs By Overcharging for Certain Directory Listings

SWBT insists on charging Texas CLECs non-TELRIC, “market-based” pricing for access to directory assistance listings and databases relating to customers outside of Texas. Because there is no evidence that SWBT imputes to itself the price it seeks to charge others for these in-region, out-of-state listings, SWBT is not in compliance with the requirements of the Act.

Pursuant to section 251(b)(3) of the Act, SWBT is required to provide competing carriers with “nondiscriminatory access” to information contained in its directory assistance listing databases. See, e.g., NY Order ¶ 353; Directory Listings Order ¶¶ 128-29; Local Competition Second Report and Order ¶ 101. Nondiscriminatory access includes “the ability of competing providers to obtain access that is at least equal in quality to that of the providing LEC.” Second Report and Order ¶ 101. The nondiscrimination requirement extends to pricing. See id. ¶ 103; see also U S West National Directory Assistance Order ¶ 35 (“[W]e conclude that U S West must make available to unaffiliated entities all of the in-region directory listing information it uses to provide regionwide directory assistance service at the same rates, terms, and conditions it imputes to itself. Thus, to the extent U S West charges unaffiliated entities for the in-region information it uses to provide nonlocal directory assistance on an integrated basis, it must impute to itself the same charges.” (footnotes omitted)); SWBT Reverse Search Services Order, ¶ 10 (requiring SWBT to “mak[e] available to unaffiliated entities all directory listing information that it uses to provide its interLATA reverse directory services . . . at the same rates, terms, and conditions, if any, it charges or imposes on its own reverse directory operations.” (footnote and quotations omitted)).

Despite this requirement, SWBT is demanding that Texas CLECs pay SWBT an excessive \$0.0583 per listing for in-region, out-of-state^{31/} directory information (including updates), even though the cost-based rate established by the Texas PUC for in-state listings is only \$0.001 per listing. See Price Decl. ¶ 26. SWBT has not shown that its own cost is \$0.0583 per listing, that it imputes these charges to itself, or that it has any accounting procedures to accomplish this imputation. In fact, SWBT's application is silent on the issue of out-of-state DA listings. See Rogers Aff. ¶ 29 (discussing provision of "Texas DA listings" only).

In a section 271 proceeding SWBT is required to submit evidence that it complies with the relevant requirements of the Act, including the "nondiscriminatory access" requirement of section 251(b)(3), as of the date of its application. Moreover, SWBT has the burden of showing that it is providing non-discriminatory access to directory listings. See Directory Listings Order ¶¶ 131-35. SWBT has failed to address this requirement in its Application as it applies to in-region, out-of-state directory assistance listings and databases.

II. THE PUBLIC INTEREST WOULD NOT BE SERVED BY SWBT'S PREMATURE PROVISION OF INTEREXCHANGE SERVICES IN TEXAS

Although SWBT -- with steady prodding from the Texas PUC -- has made undeniable progress in opening its local market in Texas, several significant barriers to effective competition remain. The factual record that SWBT relies on to demonstrate that its local market is open demonstrates only that at least some Internet service providers enjoy the benefits of competition. SWBT Br. at 6-7. Competition for local services generally is extremely limited and insufficient

^{31/} That is, database information pertaining to Arkansas, Kansas, Missouri, and Oklahoma.

to provide assurance that SWBT has fully and irreversibly opened its market. Before SWBT can be considered to have met the public interest test, it must take at least the following four steps:

- SWBT must correct -- and verify through independent testing and successful commercial operation -- the problems with its OSS that prevent it from handling commercial volumes of orders in a reasonable and nondiscriminatory manner. The improvements needed include OSS used for processing and provisioning CLEC orders for loops, UNE-P and DSL-based services.
- SWBT must eliminate the inappropriate and redundant glue charges that it currently charges CLECs, the excessive prices for access to certain directory listings, and the EAS additive charge.
- SWBT must ensure that CLECs using SWBT's UNEs are covered by SWBT's licenses from third-party vendors and are not subject to legal liability resulting from their use of SWBT's UNEs.
- SWBT must agree to a strengthened performance remedy plan.

Granting SWBT's application now, with these barriers remaining and no competitive alternatives available for most customers, would not be consistent with the "public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C).

A. Local Competition Is Limited and Narrowly Focused.

Contrary to the impression left by SWBT's estimates, facilities-based local competition is still in its infancy. Although SWBT claims that CLECs account for significant quantities of local traffic in Texas, its own data show that more than 92 percent of all minutes of traffic from SWBT customers to CLEC customers consists of traffic to ISPs sent by CLECs. See *Habeeb Aff.* ¶ 29 (15.6 billion minutes of the 16.9 billion minutes reported as SWBT to CLEC traffic between January 1997 and September 1999 is traffic to ISPs served by CLECs). Only 1.3 billion minutes in the almost three-year period represent ordinary local telephone calls or fax calls from SWBT

customers to CLEC customers. Similarly, SWBT claims only 1.1 billion minutes in this period represent traffic from CLEC customers to SWBT customers. Yet other estimates show that CLEC traffic constitutes less than two percent of the traffic on SWBT's network in Texas. See Declaration of T. Randolph Beard & John W. Mayo on Behalf of MCI WorldCom ("Beard & Mayo Decl."), ¶ 42 (Tab E hereto).

SWBT's claims concerning the extent of facilities-based competition in Texas are distorted by the fact that SWBT does not identify the number of trunks or lines in the CLEC "totals" that serve ISPs. Further, SWBT's "line count" is based on faulty estimates derived from the number of interconnection trunks between SWBT and CLEC switches, see Habeeb Aff. ¶ 27, a particularly misleading statistic where, as here, a high percentage of the trunks serve ISPs.

As explained in the attached declaration of Dr. T. Randolph Beard & Dr. John W. Mayo, ISPs have a disproportionate impact on the number of interconnection trunks, because ISPs need to have significant trunking capacity -- close to one trunk per line -- in order to handle calls during peak usage periods. See Beard & Mayo Decl. ¶ 36. As SWBT's own minutes-of-use figures confirm, the vast majority of CLEC-involved traffic in Texas is Internet traffic to ISPs. Accordingly, most CLEC trunking and line usage must be servicing ISPs. SWBT's numbers attempt to hide the small number of lines serving other types of businesses and residential customers by lumping trunks to ISPs in with trunks serving other types of customers. SWBT's "line count" is further distorted by its method of "estimating" the number of CLEC lines by multiplying 2.75 times each interconnection trunk, regardless of whether the trunk serves an ISP. See SWBT Br. at 9; Habeeb Aff. at 4 (table 1). The result is puffery that exaggerates the number